SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF STAMFORD/NORWALK

S.C. 20363

STATE OF CONNECTICUT

v.

FOTIS DULOS

BRIEF OF THE STATE OF CONNECTICUT-APPELLEE
WITH ATTACHED APPENDIX

To Be Argued By:

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NATURE OF PROCEEDINGS AND COUNTERSTATEMENT OF FACTS

On June 3, 2019, police arrested the defendant, Fotis Dulos, pursuant to a warrant charging him with two offenses: (1) tampering with or fabricating physical evidence, in violation of General Statutes § 53a-155; and (2) first-degree hindering prosecution, in violation of General Statutes § 53a-165aa. Memorandum of Decision, 9/12/19 ("Mem."), p. 1. On September 4, 2019, the defendant was arrested pursuant to a second warrant charging him with an additional count of tampering with or fabricating physical evidence. Id. As set forth in the arrest warrant affidavits, the allegations supporting the charges against the defendant stem from the May 24, 2019 disappearance of his estranged wife, Jennifer Dulos, who remains missing. Id.; see Def.'s Appendix, pp. A1-29. At the time of his wife's disappearance, the couple had been involved in a contentious divorce proceeding pending in the Stamford judicial district. Id.

As a result of the defendant's arrest in connection with his wife's disappearance, this case has generated intense media interest, enormous pretrial publicity, and ongoing "leaks" of nonpublic information by certain unidentified "law enforcement sources." Mem., pp. 2-4 (detailing findings as to nature and extent of publicity). By motion dated August 7, 2019, the state requested an order barring counsel from making public statements posing a substantial likelihood of material prejudice to the trial of this case. Id., 1. Specifically, the state moved for "an order pursuant to the Rules of Professional Conduct, Rule 3.6 (a) preventing counsel for both sides from making an extrajudicial statement that the lawyer knows or should know will be disseminated by means of public communication and will have a substantial likelihood of

materially prejudicing an adjudicative proceeding in the matter."[1] Id., 1-2. The defendant objected to the state's motion for a "gag order." Id., 2.

On August 9, 2019, the trial court, *Blawie, J.*, held a hearing at which both parties had an opportunity to be heard on the state's motion. Mem., p. 2; see T. 8/9/19, pp. 13-30. At the hearing, the state indicated, among other things, that defense counsel had made prejudicial extrajudicial statements to the media, including: (1) that Mrs. Dulos may have "staged" her death in an attempt to frame the defendant for murder; and (2) false statements "about a lie detector test taken by [the] co-defendant, [which] never happened." T. 8/9/19, p. 19. Defense counsel objected to the order for several reasons, including that a gag order was premature. Id., 26. According to defense counsel, if this case was at the stage "where actual jurors" had been seated then he "would join the State in asking for an absolute gag order." Id. But because this case was "in its incipient phases" and the disappearance of Mrs. Dulos was still "being investigated, talked about, publically speculated about," and a murder charge had not yet been lodged, neither defense counsel nor his client could "be prospectively bound from commenting on something that hasn't yet occurred." Id. In addition, defense counsel maintained that the gag order was superfluous as to him because Rule 3.6 (a) of the Rules of Professional Conduct already prohibited the attorneys from making extrajudicial statements that would have a substantial likelihood of materially prejudicing an adjudicative proceeding. Id., 22-24, 28.

At the conclusion of the hearing, the court granted the defendant's request for supplemental briefing and noted that it would take the matter "on the papers" after the parties

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[1] The state has reproduced relevant constitutional provisions, statutes, and court rules in the appendix to its brief.

had filed memoranda and issue a decision shortly thereafter. Id., 30-31. On August 19, 2019, the defendant filed his supplemental memorandum. See Def.'s Appendix, p. A100. On September 3, 2019, the state responded by filing a memorandum in support of its motion for the gag order, appending several news articles that reflected defense counsel's extrajudicial commentary about the case. Id., A127-144.[2]

On September 12, 2019, the court issued a "gag order" along with a supporting memorandum of decision articulating its factual findings and legal conclusions. See Order, 9/12/19, pp. 1-4; Mem., pp. 1-29. In pertinent part, the gag order provided as follows:

> (1) That until the final verdict is rendered and the jury has been discharged, the Parties shall henceforth refrain from making or authorizing extrajudicial comments and disseminating or authorizing the dissemination of information to the media and the public concerning the following:
>
> a. the character, credibility, reputation or criminal record of any party, victim, or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> b. the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

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[2] For instance, a New York Post article dated June 22, 2019 quoted defense counsel, Attorney Norm Pattis, as follows: (1) the defendant's wife "had a 'troubled past' and 'struggled with heroin her whole life'"; (2) the defendant's wife "'had a relationship with a person who would import heroin from Cambodia' prior to dating" the defendant; (3) the defendant's wife "once disappeared from New York and 'lived for years under a false name' after an 'intrafamilial dispute about money'"; (4) the defendant's wife "had 'severe psychiatric problems,' was on anti-depressants, and 'a custody study was prepared to give [the defendant] unsupervised access to the children"; and (5) the defendant "received a $14,000 bill in April for unknown blood work [his wife] had done." Def.'s Appendix, p. A128. Additionally, in a WFSB article dated June 14, 2019, defense counsel was quoted as follows: "'My understanding is that [codefendant Michelle Troconis] has taken a polygraph exam and the question of whether she had any knowledge of any foul play or disposal of evidence, and she satisfied police in that polygraph exam, and she provided an alibi. . . .'" Id., A142. During the hearing, the state disputed the accuracy of defense counsel's statements regarding a polygraph. T. 8/9/19, p. 19.

c. the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

d. information that the Parties know or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

e. with the exception of the defendant, Fotis Dulos, any opinion as to the guilt or innocence of the defendant.

Order, 9/12/19, p. 2.

By its terms, the gag order applied to the lawyers for both parties, the defendant himself, all potential witnesses who may be called to testify at trial, and all of the various police agencies that have been actively investigating the disappearance of the defendant's wife. See Order, 9/12/19, pp. 1-2; Mem., p. 4. The court expressly noted, however, that the gag order did not apply to the public at large or the media; consequently, "the public, and the press, television networks, and other entities or attorneys not covered by this order may obviously continue to publicly disseminate stories, articles or commentary about this case, or to engage in speculation or conjecture via social media outlets. . . ." Mem., p. 5.

In support of its decision to issue a gag order, the court found that the "pervasive information and misinformation" that had been disseminated in this "high profile case," as well as continuing "leaks" of nonpublic information by certain unidentified law enforcement sources, created "the potential to overwhelm the vital, constitutionally guaranteed right to a fair trial," especially "where there is still an active criminal investigation and an ongoing process of fact-gathering into the disappearance and current whereabouts of" the defendant's wife. Mem., pp. 2-3 and notes 1 and 2 (referencing media reports). In particular, the court noted as follows:

> The issues raised by the state's motion must be viewed against the backdrop of the intense media interest in this case. That publicity has only grown since May 24, 2019, the day that Jennifer Dulos was first reported missing, and her home at 69 Welles Lane in New Canaan was considered a crime scene. The level of press coverage it has engendered in today's new social media environment has also seen the publication of many different opinions, theories masquerading as facts, and stories based upon unauthorized leaks of partial information, some apparently from law enforcement sources. The extent and the nature of the coverage is not merely a result of the public record of the case, but rather, it reflects the tendency of some to fan the flames of publicity by providing the media with salacious, inadmissible, and often prejudicial details. In the articles cited in footnote [1, above], defense counsel made statements to the press advancing theories about Jennifer Dulos' possible motive for framing the defendant, and also made disparaging remarks about her mental health and personal life. The court is also concerned with leaks by investigating police agencies, and it takes judicial notice of press accounts replete with references to "law enforcement sources." See *Staehr* v. *Hartford Financial Services Group, Inc.,* 547 F.3d 406, 424 (2d Cir. 2008) (affirming district court's decision to take judicial notice of media reports, not for the truth of any matters that may be asserted in such reports, but rather to establish that such matters had been publicly asserted); see also *Mahoney* v. *Lensink,* 213 Conn. 548, 562 n.20, 569 A.3d 518 (1990). Most recently, on September 9, 2019, the case was the subject of a nationally broadcast Dateline NBC story entitled *The Disappearance of Jennifer Dulos*. The show featured interviews with the defendant and his attorney, potential trial witnesses and certain members of law enforcement. The problem with pervasive information or misinformation in the social media age is that in a high-profile case, it carries the potential to overwhelm the vital, constitutionally guaranteed right to a fair trial. This is a particular danger here, where there is still an active criminal investigation and an ongoing process of fact-gathering into the disappearance and current whereabouts of this missing mother of five minor children.

(Footnotes omitted.) Mem., pp. 2-3.

Based on the weight of federal authority regarding the appropriate legal standard for the imposition of gag orders on trial participants, the court concluded that: (1) the "pervasive nature of [media] coverage poses a substantial likelihood that if an order is not issued, and extrajudicial comments of this type were to continue, they are substantially likely to materially prejudice these proceedings"; (2) the court had "narrowly tailored" the gag order to comport with preexisting standards regulating attorney speech under the Practice Book and the Rules

of Professional Conduct, the gag order was not a "no comment" rule, and the gag order expressly preserved defense counsel's "right to make a statement that a reasonable lawyer would believe is required to protect [his] client from substantial undue prejudicial effect of recent publicity not initiated by the defendant's counsel or the defendant" as long such a statement was "limited to such information as is necessary to mitigate the recent adverse publicity"; and (3) less restrictive measures such as change of venue, more searching voir dire, emphatic jury instructions, trial postponement, and jury sequestration were not enough to ensure a fair trial. Id., 18-27.

On September 25, 2019, the defendant filed his application for a public interest appeal on the following question: "Whether, under the first amendment to the United States Constitution, a trial court can issue a prior restraint enjoining the target of a police investigation raising highly publicized suspicions of murder from commenting on the investigation, in the absence of any pending murder charge?" Application, p. 1. On October 2, 2019, the Chief Justice granted the defendant's application.

ARGUMENT

I. THE TRIAL COURT'S GAG ORDER COMPORTS WITH THE DEFENDANT'S RIGHT TO FREE SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The defendant claims that the court's gag order violates his right to free speech under the first amendment to the United States constitution. Def.'s Brief, pp. 4-30. In support of his claim, the defendant argues that "the order is a content-based prior restraint that freezes him in the exercise of his first amendment right to speak out about potential charges not yet filed but suggested by the state's pleadings, is overbroad in its application, and is a glaring misuse of Rule 3.6 (a)" of the Rules of Professional Conduct. Id., 4. In addition to his arguments

under the First Amendment, the defendant contends that "given the unique posture of this case," the gag order deprives him of his Sixth Amendment right to a fair trial because the "[s]tate has fanned public speculation that [he] killed his wife, but has not charged him with any crime in which his wife is a victim." Id. According to the defendant, the trial court was not entitled to balance the defendant's right to speak freely about the criminal charges in this case against the need to ensure a fair trial because the defendant "alone possesses a constitutional right to a fair trial. . . ." Id., 31.

Contrary to the defendant's assertion, this Court should uphold the trial court's gag order under the First Amendment as a valid prior restraint. First, based on the weight of federal authority, the trial court properly adopted the "substantial likelihood of material prejudice" test (hereinafter "substantial likelihood" test) as the appropriate constitutional standard for the imposition of a gag order on trial participants. Second, the trial court properly applied the "substantial likelihood" test to the facts and circumstances of this case and reasonably concluded that a gag order was necessary to safeguard the state's compelling interest in securing a fair trial for the defendant untainted by the influence of an extreme amount of prejudicial publicity surrounding this case. Id. Third, contrary to the defendant's assertion, the gag order is neither vague nor overbroad, but rather, narrowly tailored to prohibit only certain limited types of speech that would create a substantial likelihood of material prejudice. Additional arguments raised by the defendant will be addressed below.

A. General Principles Regarding Prior Restraints

The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

A prior restraint on speech, also known as a "gag order," is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539, 559 (1976). As an "immediate and irreversible sanction," a prior restraint not only "chills speech" but "freezes it at least for the time." (Internal quotation marks omitted.) Id. Hence, "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." (Internal quotation marks omitted.) *New York Times Co.* v. *United States,* 403 U.S. 713, 714 (1971).

It is well established, however, that the presumption against prior restraints may be overcome in exceptional circumstances involving extraordinary publicity. *Nebraska Press Ass'n* v. *Stuart,* supra, 427 U.S. 570. Intense publicity surrounding a sensational criminal case poses significant and well-known risks to a fair trial. See *Pennekamp* v. *Florida,* 328 U.S. 331, 366 (1946) (*Frankfurter, J.*, concurring) ("[I]t is indispensable . . . that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence."); see also *Bridges* v. *California,* 314 U.S. 252, 270 (1941) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); *Patterson* v. *Colorado,* 205 U.S. 454, 462 (1907) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). Among these dangers is the potential that pretrial publicity may taint the jury pool, resulting in a jury that is biased against either party. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by

extrajudicial statements would violate that fundamental right." *Gentile* v. *State Bar of Nevada,* 501 U.S. 1030, 1075 (1991).

Accordingly, trial judges have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 378 (1979); see also *Chandler* v. *Florida,* 449 U.S. 560, 574 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). "The beneficiaries of this duty include not only the defendant in a given trial, but other defendants as well, such as co-defendants in the same case or defendants in related cases . . . whose fair trial rights might be prejudiced by the extrajudicial statements of other trial participants. The vigilance of trial courts against the prejudicial effects of pretrial publicity also protects the interest of the public and the state in the fair administration of criminal justice." *United States* v. *Brown*, 218 F.3d 415, 424 (5th Cir. 2000).

The trial court's duty to minimize the effects of prejudicial pretrial publicity comports with the nature of all First Amendment rights, which are not absolute but must instead be "applied in light of the special characteristics of the [relevant] environment." *Tinker* v. *Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503, 506 (1969). "Although litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise" in both civil and criminal trials. (Internal quotation marks omitted.) *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32 n.18 (1984). "There can be no question that a criminal defendant's [Sixth Amendment] right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps." *United States* v. *Brown*, supra, 218 F.3d 424; see *Estes* v. *Texas,* 381 U.S. 532, 540 (1965) (Supreme Court has "always held that the atmosphere essential to

the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs."); *Pennekamp* v. *Florida,* supra, 328 U.S. 366 (*Frankfurter, J.*, concurring) ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries."). Accordingly, the Supreme Court "has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Seattle Times Co. v. Rhinehart,* supra, 467 U.S. 32 n.18; see *Nebraska Press Ass'n* v. *Stuart*, supra, 427 U.S. 539 ("reaffirm[ing] that the guarantees of freedom of expression are not an absolute prohibition [on prior restraints] under all circumstances").

B. Standard Of Review

The standard by which courts evaluate the constitutionality of gag orders depends upon whether the media or trial participants are being restrained. *United States* v. *Brown*, supra, 218 F.3d 425; *In re Application of Dow Jones & Co.,* 842 F.2d 603, 608 (2d Cir.), cert. denied, 488 U.S. 946 (1988). When a gag order is imposed on the media, the Constitution requires an exacting standard akin to strict scrutiny. See *Gentile* v. *State Bar of Nevada,* supra, 501 U.S. 1070-71 (recognizing that *Nebraska Press* and other cases involving prior restraints on speech "require a showing of 'clear and present danger' before a State may prohibit media speech or publication about a particular pending trial"). In this case, however, the trial court's gag order was imposed on the trial participants, not the media.

"No Supreme Court case has addressed the constitutionality of gag orders on lawyers and parties," and "lower courts are split as to the applicable standard." E. Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 Loy. L.A. L.J. 311, 313-314 & n.11 (1997); see *United States* v. *Brown,* supra, 218 F.3d 425-28 (discussing split); see also Part I.C., below. For example, the

Sixth, Seventh, and Ninth Circuits have held that gag orders on trial participants must meet the demanding "clear and present danger" test for free speech cases enunciated in *Near* v. *Minnesota,* 283 U.S. 697 (1931), or the functional equivalent. See *United States* v. *Ford*, 830 F.2d 596, 598 (6th Cir. 1987) ("We see no legitimate reasons for a lower standard for individuals [as compared to the press]."); accord *Chicago Council of Lawyers* v. *Bauer,* 522 F.2d 242, 249 (7th Cir.1975) (applying "serious and imminent threat" test), cert. denied, 427 U.S. 912 (1976); *Levine* v. *United States District Court,* 764 F.2d 590, 595-96 (9th Cir.1985) (same), cert. denied, 476 U.S. 1158 (1986).

In contrast, the Second, Fourth, and Tenth Circuits analyze the constitutionality of gag orders on trial participants under the less stringent standard of whether the participant's comments present a "reasonable likelihood" of prejudicing a fair trial. See *In re Application of Dow Jones & Co.,* 842 F.2d 603, 610 (2d Cir.), cert. denied, 488 U.S. 946 (1988);[3] *In re Russell,* 726 F.2d 1007, 1010 (4th Cir.), cert. denied, 469 U.S. 837 (1984); *United States* v. *Tijerina,* 412 F.2d 661, 666-67 (10th Cir.), cert. denied, 396 U.S. 990 (1969). *See also News-Journal Corp.* v. *Foxman,* 939 F.2d 1499, 1512-15 (11th Cir.1991) (discussing authority for less stringent standard).

Without deciding whether the "reasonable likelihood" test would pass constitutional muster, the Fifth Circuit has held that the "clear and present danger" test for media gag orders is not required for gag orders on trial participants, which are analyzed under the "substantial likelihood" test, an intermediate level of scrutiny. See *United States* v. *Brown,* supra, 218

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[3] "[I]t is well settled that decisions of the Second Circuit, while not binding [on] this [C]ourt, nevertheless carry particularly persuasive weight in the resolution of issues of federal law when the United States Supreme Court has not spoken on the point." (Internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 783 (2011).

F.3d 427-28; accord *United States* v. *Scarfo*, 263 F.3d 80, 93 (3d Cir. 2001) (examining record to determine whether trial court's gag order "prevented a substantial likelihood of material prejudice to the judicial proceeding").

In this case, before issuing the gag order, the trial court compared the various tests used in the federal circuits and adopted the "substantial likelihood" test. Whether the court adopted the correct test for evaluating the constitutionality of gag orders on trial participants is a legal question subject to plenary appellate review. See *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 398 n.11 (2008) (scope of constitutional right is question of law). However, the court's application of the legal test to the facts and circumstances of this case should be governed by the abuse of discretion standard of review. See generally *United States v. Noriega,* 917 F.2d 1543, 1549 (11th Cir.) (trial courts have "broad discretion to balance First Amendment interests with a criminal defendant's Sixth Amendment right to a fair trial"), cert. denied sub nom. *Cable News Network* v. *Noriega,* 498 U.S. 976 (1990); e.g., *South Bend Tribune* v. *Elkhart Circuit Court*, 691 N.E.2d 200, 203 (Ind. Ct. App. 1998) (holding that "trial court did not abuse its discretion by determining that there was a reasonable likelihood that the pretrial publicity would prejudice the trial and that the only effective remedy was an order restraining the parties from discussing the case with the media"); *In re Benton*, 238 S.W.3d 587, 601 (Tex. App. 2007) (concluding that judge "abused her discretion in entering the gag order").[4]

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[4] But see *State* v. *Parnoff*, 329 Conn. 386, 395 (2018) ("in certain cases involving the regulation of free speech" this Court applies "a de novo standard of review [as] the inquiry into the protected status of . . . speech is one of law, not fact. . . ." [internal quotation marks omitted]).

C. The Trial Court Correctly Adopted The "Substantial Likelihood" Test For Gag Orders On Trial Participants.

The defendant contends that gag orders on trial participants are subject to the same type of strict scrutiny that applies to media gag orders under *Nebraska Press Ass'n* v. *Stuart,* supra, 427 U.S. 539. See Def.'s Brief, pp. 6-8. Contrary to the defendant's assertion, the trial court properly recognized the distinction between gag orders directed at the media, which are subject to strict scrutiny, and those directed at trial participants, which are subject to lesser scrutiny, and correctly adopted the "substantial likelihood" test for gag orders directed at trial participants. To appreciate the basis for this distinction, it is first necessary to compare the Supreme Court's decisions in *Nebraska Press* and *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1030.

In *Nebraska Press*, the Supreme Court considered the constitutionality of a gag order in a murder case that had attracted widespread news coverage. *Nebraska Press Ass'n* v. *Stuart*, supra, 427 U.S. 545. The gag order applied directly to the media and explicitly prohibited the broadcast or publication of news reports on several specific topics related to the murder case. Id. On appeal, the Supreme Court treated the gag order as a prior restraint and indulged a "heavy presumption against its constitutional validity." (Internal quotation marks omitted.) Id., 558. To ascertain whether the presumption had been overcome, the Court indicated that it must determine whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." (Internal quotation marks omitted.) Id., 562. This, in turn, required a consideration of the probable extent of pretrial media coverage, the nature of that coverage, and the likely impact of that coverage on potential jurors; see id., 562; whether alternative measures might as

effectively mitigate the prejudicial impact of pretrial coverage; see id., 563; and "the probable efficacy of prior restraint on publication as a workable method of protecting [the accused's] right to a fair trial. . . ." Id., 565. In addition, the Court noted that "[t]he precise terms of the restraining order are also important." Id., 562.

Based on this analysis, the Court concluded that the gag order in *Nebraska Press* violated the First Amendment:

> The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Id., 568-69. Although the Court did not specify the relative weights to be assigned each of the relevant factors, the analysis in *Nebraska Press* is consistent with the general understanding that a prior restraint on the media is permissible only if narrowly tailored to avoid a "clear and present danger" or "serious and imminent threat" to a competing, protected interest, and only to the extent that no alternatives less restrictive than a prior restraint are reasonably available. See *CBS Inc.* v. *Young*, 522 F.2d 234, 238 (6th Cir. 1975); *Levine v. United States District Court,* supra, 764 F.2d 595.

Subsequently, in *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1074-75, the Supreme Court considered the constitutionality of a Nevada Supreme Court rule prohibiting

any attorney from making extrajujdicial comments to the media that the attorney knew or should have known would "have a substantial likelihood of prejudicing an adjudicative proceeding." In *Gentile*, an attorney held a press conference the day after his client was indicted on criminal charges. Id., 1063-65. The attorney proclaimed his client's innocence, suggested that a police detective was in fact the perpetrator, and stated that the alleged victims were not credible. Id. Although the trial court "succeeded in empaneling a jury that had not been affected by the media coverage and [the client] was acquitted on all charges, the [Nevada] state bar disciplined [the attorney] for his statements" following the trial. Id., 1064. The Nevada Supreme Court upheld the state bar's disciplinary action, finding that the attorney "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." Id., 1065.

In an opinion written by Justice Kennedy, a five-justice majority of the Supreme Court reversed the judgment after finding that the Nevada Supreme Court's construction of the disciplinary rule was "void for vagueness." Id., 1048-51; see Part I.F., below. Nevetheless, in a separate opinion written by Chief Justice Rehnquist, a different five-member majority held that the "substantial likelihood of prejudice" test struck the proper constitutional balance between an attorney's First Amendment rights and the state's interest in fair trials. Id., 1065-76. In so doing, the Court held that the stringent standard governing prior restraints on the media set forth in *Nebraska Press Ass'n* v. *Stuart,* supra, 427 U.S. 539, should not apply to prior restraints on lawyers whose clients are parties to a criminal proceeding. Id., 1074; see also *News-Journal Corp.* v. *Foxman*, 939 F.2d 1499, 1512-13 (11th Cir. 1991) (noting that Supreme Court has endorsed restricting speech of trial participants as *alternative* to prior restraint on media). The Court quoted with approval from *Sheppard* v. *Maxwell,* 384 U.S.

333, 363 (1966), in which the defendant's conviction was overturned because of prejudicial publicity that prevented him from receiving a fair trial:

> [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

(Internal quotation marks omitted.) *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1072. Moreover, in endorsing the "substantial likelihood" test, the Court drew heavily upon the long history of extensive regulation of American lawyers as officers of the courts, and reasoned that attorneys acting as advocates in a judicial proceeding do not enjoy the same First Amendment protections as the general public, both due to their membership in a specialized profession and their status as officers of the court. Id., 1066 ("Membership in the bar is a privilege burdened with conditions. . . ." [internal quotation marks omitted]); see also *In re Sawyer,* 360 U.S. 622, 646-47 (1959) (*Stewart, J.*, concurring) ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."); *Haeberle* v. *Tex. Int'l Airlines,* 739 F.2d 1019, 1022 (5th Cir.1984) ("By voluntarily assuming the special status of trial participants and officers of the court, parties and their attorneys subject themselves to greater restraints on their communications than might constitutionally be applied to the general public."). In addition, the Court noted that "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1074.

In the wake of *Gentile*, some federal circuits have required a showing of a "substantial likelihood of material prejudice" from pervasive pretrial publicity before a gag order can issue. See, e.g., *United States* v. *Brown*, supra, 218 F.3d 426 (adopting "substantial likelihood" test); *United States* v. *Scarfo*, supra, 263 F.3d 93 (same);[5] *United States* v. *Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (same).[6] Other circuits have required that the proponent of a gag order establish a "reasonable likelihood of material prejudice" from pretrial publicity before such an order can issue. See, e.g., *In re Application of Dow Jones & Co.*, supra, 842 F.2d 610 (applying "reasonable likelihood" test);[7] *In re Morrissey*, 168 F.3d 134, 138-40 (4th Cir.) (same), cert. denied, 527 U.S. 1036 (1999). Regardless of which standard applies, the majority of federal circuits have indicated that the "clear and present danger" test, a more stringent test that applies to gag orders imposed on the *media*, is not a condition precedent to gag orders imposed on *trial participants*. See *United States v. Brown*, supra, 218 F.3d 426-28 (comparing authorities). Moreover, as the Fifth Circuit recognized in *Brown*, the federal "cases endorsing some version of the 'clear and present danger' test all predated *Gentile* and did not consider the distinction—explicitly recognized in that case—between trial

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[5] See also *United States* v. *Wecht*, 484 F.3d 194, 205 (3d Cir. 2007) (amending local court rule prohibiting certain pretrial attorney speech to comply with *Gentile* and Rule 3.6: "we now exercise our supervisory authority to require that district courts apply [the local rules] to prohibit only speech that is substantially likely to materially prejudice ongoing criminal proceedings").

[6] In light of *Wunsch*, there may be a conflict in the Ninth Circuit following *Gentile*. Compare *United States* v. *Wunsch*, supra, 84 F.3d 1117 (applying "reasonable likelihood" test), with *Levine* v. *United States District Court,* supra, 764 F.2d 595-96 (applying "serious and imminent threat" test).

[7] See also *United States* v. *Cutler*, 58 F.3d 825, 835 (2d Cir. 1995) (upholding order requiring defense counsel to comply with local rule prohibiting certain category of remarks if "reasonably likely to interfere with fair trial or administration of justice").

participants and the press for purposes of a trial court's ability to restrict the speech of those two groups." Id., 427.

Here, after carefully examining the weight of federal authority, Judge Blawie correctly followed the Fifth Circuit's approach in *Brown* and applied the "substantial likelihood" test rather than the *less stringent* "reasonable likelihood" test endorsed by the Second, Fourth, and Tenth Circuits. Likewise, Judge Blawie properly "decline[d] to adopt the more stringent tests advocated by the Sixth, Seventh, and Ninth Circuits because *Gentile* appears to have foreclosed the applicability of those tests to the regulation of speech by trial participants." Id. In accordance with the Fifth Circuit's approach:

> If the [trial] court determines that there is a "substantial likelihood" (or perhaps even merely a "reasonable likelihood," a matter we do not reach) that extrajudicial commentary by trial participants will undermine a fair trial, then it may impose a gag order on the participants, as long as the order is also narrowly tailored and the least restrictive means available. This standard applies to both lawyers and parties, at least where the court's overriding interest is in preserving a fair trial and the potential prejudice caused by extrajudicial commentary does not significantly depend on the status of the speaker as a lawyer or party.

Id., 428.

D. The Trial Court Properly Applied The "Substantial Likelihood" Test To The Facts And Circumstances Of This Case.

As to the gag order itself, the trial court reasonably concluded that it was necessary to safeguard a fair trial untainted by the influence of extreme prejudicial publicity surrounding this case. Id. First, in support of its decision to impose a gag order, the court found that the "pervasive information and misinformation" that had been disseminated by defense counsel in this "high profile case," as well as the continuing "leaks" of nonpublic information by certain unidentified law enforcement sources, created "the potential to overwhelm the vital,

constitutionally guaranteed right to a fair trial," especially "where there is still an active criminal investigation and an ongoing process of fact-gathering into the disappearance and current whereabouts of" the defendant's wife. Mem., pp. 2-3. Among other evidence, the court's finding was based on news articles in which defense counsel stated that codefendant Michelle Troconis had passed a polygraph regarding any knowledge of foul play and the disposal of evidence. Compare *WXIA-TV* v. *State*, 811 S.E.2d 378, 387 (Ga. 2018) ("although the record shows significant media interest in the case, it does not demonstrate any likelihood that the persons to whom the modified gag order is directed would make prejudicial statements"). Comments by trial participants to the news media about inadmissible evidence such as polygraph results are extremely prejudicial; see *State* v. *Leniart*, 333 Conn. 88, 126 (2019) (reaffirming that "neither the results of a polygraph test nor the willingness of a witness to take such a test is admissible in Connecticut courts" [internal quotation marks omitted]); and courts may prohibit such statements by issuing a gag order. See Rules of Professional Conduct (2019), Rule 3.6, commentary (recognizing that "certain subjects" will "more likely than not" have prejudicial impact on "criminal matter" or "any proceeding that could result in incarceration" including "the performance or results of any examination or test"). Based on the court's factual findings regarding defense counsel's comments, it reasonably concluded that the "pervasive nature of [media] coverage poses a substantial likelihood that if an order is not issued, and extrajudicial comments of this type were to continue, they are substantially likely to materially prejudice these proceedings." Mem., pp. 21-22; see *Levine* v. *United States District Court*, supra, 764 F.2d 598 (recognizing that "circus-like atmosphere that surrounds highly publicized trials threatens the integrity of the judicial system").

Second, the court's gag order was "narrowly tailored" to comport with preexisting standards regarding attorney speech under the Practice Book and the Rules of Professional Conduct. See Practice Book § 42-48; Rule 3.6 and Rule 3.8 of the Rules of Professional Conduct. The court noted that the gag order was not a "no comment" rule, and, by its express terms, the gag order preserved defense counsel's "right to make a statement that a reasonable lawyer would believe is required to protect [his] client from substantial undue prejudicial effect of recent publicity not initiated by the defendant's counsel or the defendant" as long such a statement was "limited to such information as is necessary to mitigate the recent adverse publicity." Mem., p. 23; Order, 9/12/19, p.3. Significantly, the gag order does not prohibit the defendant or his attorney from criticizing the manner in which government officials are handling the case. See *United States* v. *Ford,* supra, 830 F.2d 600. Moreover, although the gag order restricts the speech of trial participants, it does not apply to the public at large or the media; consequently, "the public, and the press, television networks, and other entities or attorneys not covered by [the gag] order may obviously continue to publicly disseminate stories, articles or commentary about this case, or to engage in speculation or conjecture via social media outlets. . . ." Mem., p. 5

Third, before imposing a gag order, the court expressly considered less restrictive measures such as change of venue, more searching voir dire, emphatic jury instructions, trial postponement, and jury sequestration, but concluded that such measures were not enough to ensure a fair trial. Mem., pp. 26-27. The record supports the court's conclusion that less restrictive measures would be insufficient to address the potentially toxic effects of enormous pretrial publicity on the fairness of the defendant's trial. As the Supreme Court has noted, even "[e]xtensive voir dire may not be able to filter out all of the effects of pretrial publicity,

and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements" by trial participants. *Gentile* v. *State Bar of Nevada,* supra, 501 U.S. 1075. Like voir dire, "emphatic" jury instructions may be an imperfect filter at best, and also would fail to address the threat of a "carnival-like atmosphere" around the trial. See *Levine* v. *United States District Court,* supra, 764 F.2d 600. Moreover, "[d]elaying the commencement of the trial and sequestering the jury both impose well-known and serious burdens in their own right. . . . In short, all of these options carry with them significant costs without addressing the root cause of the [trial] court's concern." *United States* v. *Brown*, supra, 218 F.3d 431; see also *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1075 (noting that "voir dire, change of venue, or some other device . . . entail serious costs to the system [which] [t]he State has a substantial interest" in avoiding). As the Supreme Court has observed, when considering how to "cure" the effects of pretrial publicity, a trial court's overriding objective is to employ "those remedial measures that will prevent the prejudice at its *inception*." (Emphasis added.) *Sheppard* v. *Maxwell*, supra, 384 U.S. 363.

In sum, given the difficult and "necessarily speculative" task of trying to prevent prejudice that has not yet occurred—a task that involves the weighing of "factors unknown and unknowable"; *Nebraska Press Assn. v. Stuart,* supra, 427 U.S. 563; the trial court properly imposed the gag order on all of the trial participants, including the defendant, after finding that: (1) extrajudicial comments by defense counsel and law enforcement had created a substantial likelihood of material prejudice; (2) other less restrictive prophylactic measures were insufficient to ensure a fair trial; and (3) limiting the scope of its gag order to certain narrow categories of unprotected speech.

E. The Trial Court's Gag Order Is Not Overbroad.

The defendant contends that the gag order "is overbroad and vague as to the speech of his counsel." Def.'s Brief, p. 23. In determining whether a gag order passes constitutional muster, courts must be mindful that the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward* v. *Rock Against Racism,* 491 U.S. 781, 799 (1989); see also *Madsen* v. *Women's Health Center, Inc.,* 512 U.S. 753, 765 (1994) (test is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest"); *Procunier* v. *Martinez,* 416 U.S. 396, 413 (1974) (limitation on speech "must be no greater than is necessary or essential to the protection of the particular governmental interest involved"); e.g., *United Sates* v. *Brown,* supra, 218 F.3d 429 (rejecting overbreath challenge to gag order on trial participants).

Contrary to the defendant's assertion, Judge Blawie acted well within the constitutional limits of specificity by drafting the gag order in a way that sufficiently protects the defendant's Sixth Amendment right to a fair trial by an impartial jury while preserving his First Amendment right to free speech as well as the media's right to gather and report the news of the proceedings in this high profile criminal case. The order specifies to whom it applies, how long it is to remain in effect, and what type of speech is prohibited. Compare *United States* v. *Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (gag order prohibiting defense counsel from publicly making any statements that "have anything to do with this case" overbroad), with *United States* v. *McVeigh*, 964 F. Supp. 313, 316 (D. Col. 1997) (finding that complete ban on extrajudicial statements by lawyers and support personnel was best method of ensuring that media reporting would have minimal impact on unsequestered jurors, and order placed

no restrictions on media). Furthermore, it delineates what type of speech is exempt from the court's restrictive order. See *United States* v. *Brown*, supra, 218 F.3d 429-30 (upholding gag order that "left available to the parties various avenues of expression, including assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record"); *In re Application of Dow Jones,* supra, 842 F.2d 606 (same). Accordingly, the court's gag order burdens no more speech than is necessary to protect the parties' Sixth Amendment right to a fair trial.

F. The Trial Court's Gag Order Is Not Vague.

The defendant contends that the gag order is unconstitutionally vague because it fails to give his defense attorney "fair notice" as to what speech is prohibited. See Def.'s Brief, pp. 26-29. Specifically, the defendant claims that "Judge Blawie's order suffers from the very defect that required reversal of discipline in *Gentile*: a trial participant seeking to obey this order must 'guess at its contours.'" Id., pp. 28-29, quoting *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1049 (*Kennedy, J.*, dissenting in part). The defendant is incorrect.

As previously set forth, in *Gentile*, Chief Justice Rehnquist, writing for a five-justice majority, held that the "substantial likelihood" test struck the proper constitutional balance between an attorney's First Amendment rights and the state's interest in fair trials. *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1065-76 (*Rehnquist, C.J.*, dissenting in part) Nevertheless, in a separate opinion written by Justice Kennedy, a different five-justice majority reversed the judgment after finding that the state supreme court's construction of the Nevada disciplinary rule was "void for vagueness" because the safe-harbor provision did not provide attorneys with sufficient guidance "for determining when [their] remarks pass from

the safe harbor of the general to the forbidden sea of the elaborated." Id., 1048-51 (*Kennedy, J.*, dissenting in part).

When *Gentile* was decided in 1991, Nevada's disciplinary rule was essentially the same as the version of Rule 3.6 of the American Bar Association ("ABA") Model Rules of Professional Conduct that was then in effect. In 1994, however, the ABA amended Model Rule 3.6 to cure the vagueness problem in *Gentile* by adding an exception that allows lawyers to make extrajudicial statements to protect clients from "recent publicity not initiated by the lawyer or the lawyer's client." See ABA Annotated Model Rules of Professional Conduct (9th Ed. 2019), commentary to Rule 3.6 (appended hereto). In 2002, Connecticut followed suit by amending its version of Rule 3.6 to include subsection (b), which contains the same exception. See Rules of Professional Conduct (2003), Rule 3.6. Thus, contrary to the defendant's assertion, Judge Blawie's gag order, which expressly incorporates the post-*Gentile* safe harbor provision of Rule 3.6 (b), avoids the vagueness problem that doomed the Nevada rule in *Gentile*.

G. The Trial Court Is Duty-Bound To Protect The Defendant's Sixth Amendment Right To A Fair Trial Regardless Of His Wishes.

In a separately briefed issue, the defendant maintains that the trial court's gag order violates his Sixth Amendment rights because "[he] alone possesses a constitutional right to a fair trial" and, therefore, only he can decide how to balance his First Amendment right to free speech against his Sixth Amendment right to a fair trial. Def.'s Brief, pp. 31-33. The defendant's novel argument fails for two reasons. First, as previously set forth, a trial judge's primary responsibility is to ensure that the defendant receives a fair trial by an impartial jury. *Gannett Co.* v. *DePasquale,* supra, 443 U.S. 378; *United States* v. *Brown*, supra, 218 F.3d

424. "To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." *Gannett Co.* v. *DePasquale,* supra, 443 U.S. 378. Second, it is unavailing that the Sixth Amendment guarantees the defendant alone a right to a fair trial because the state and the public at large also have a compelling interest in a fair trial. *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1065-71; see also *State* v. *Van Sant*, 198 Conn. 369, 382 (1986) (noting "public's interest in a fair trial and just judgment"); *State* v. *Anderson*, 295 Conn. 1, 14 (2010) (same).

H. The Trial Court Issued The Gag Order Based On A Proper Evidentiary Foundation.

Judge Blawie properly issued the gag order with the benefit of a sufficient evidentiary foundation, from which he found a substantial likelihood that the pervasive pretrial publicity surrounding this case will make it difficult to impanel an impartial jury and thereby imperil a fair trial. Contrary to the defendant's suggestion, courts need not conduct a full scale, adversarial evidentiary hearing before issuing a gag order; rather, the court may take judicial notice of pretrial publicity that has already occurred in the case. See *Sioux Falls Argus Leader* v. *Miller*, 610 N.W.2d 76, 87 (S.D. 2000) (both trial court and reviewing court "may take judicial notice . . . of the significant pretrial publicity . . . by both the broadcast and print media" when determining the validity of gag order); accord *Rolling* v. *Crosby*, 438 F.3d 1296, 1298, 1301 (11th Cir. 2006) (noting that defense counsel "supplemented motion [for change of venue] with numerous newspaper articles and radio and television transcripts"; "trial court took judicial notice of the extensive pretrial publicity" before ruling on motion; and rejecting

claim of ineffective assistance of counsel after concluding that "attorneys performed competently in moving for a change of venue based on their extensive filings related to pretrial publicity"); *In re Houston Chronicle Pub. Co.*, 64 S.W.3d 103, 109 (Tex. App. 2001) (concluding that gag order was justified by evidence that established threat to defendant's Sixth Amendment rights where trial court "made specific findings of fact supported by judicial notice of obvious circumstances" regarding pretrial publicity).

Of course, "[p]rior to issuing a permanent injunction which prohibits the dissemination of information by parties, counsel and witnesses, the court should hold an evidentiary hearing at which all potentially enjoined persons are given a right to be heard. The court should make clearly articulated findings of fact addressing the probability that the defendant's right to a fair trial or his constitutional rights would be irreparably damaged." *CBS Inc.* v. *Young*, supra, 522 F.2d 239. Judge Blawie complied with *Young*'s directive by giving the parties an unlimited right to be heard, taking judicial notice of defense counsel's prejudicial remarks to the media concerning the case, balancing the free speech rights of the trial participants against the need to ensure a fair trial, and clearly articulating his findings in a comprehensive memorandum of decision.

I. That Rule 3.6 Already Prohibits Defense Counsel From Making Certain Extrajudicial Statements Is Irrelevant To The Basis For The Gag Order.

Contrary to the defendant's assertion, the fact that his *defense attorney* could be disciplined for making prejudicial extrajudicial comments in derogation of Rule 3.6 is of no moment. See *Atlanta Journal-Constitution* v. *State*, 596 S.E.2d 694, 696 (Ga. App. 2004) (noting that "substantial likelihood of material prejudice" test "enunciated in *Gentile* has been incorporated into Rule 3.6 of the State Bar of Georgia Rules of Professional Conduct," and

therefore, that "precedent supports the trial court's [gag] order to the extent that it prohibits counsel from making comments already prohibited by" Rule 3.6). Indeed, for all the reasons set forth in *Gentile*, the unique role of attorneys in our judicial system supports the issuance of a gag order, rather than undermining it. See Part I.C., above.

J. The Trial Court Properly Imposed The Gag Order On The Defendant As Well As His Counsel.

Lastly, the defendant contends that "[w]hatever regulatory power the [trial court] may possess as to the speech of a lawyer appearing before it, it possesses no right to trump the right of a man accused of a crime, presumed innocent, and ready, willing and able to protest to the world at large that he is being unfairly and unjustly targeted." Id., 29. The short answer to this claim is that the trial court's gag order does not prevent the defendant from publicly proclaiming his innocence. As previously illustrated, the court's order explicitly allows the defendant to publicly state his opinion that he is innocent, and the order expressly preserved his attorney's "right to make [any] statement that a reasonable lawyer would believe is required to protect [his] client from substantial undue prejudicial effect of . . . publicity not initiated by the defendant's counsel or the defendant" as long as such statements are "limited to such information as is necessary to mitigate the . . . adverse publicity." See Nature Of Proceedings And Counterstatement Of Facts, above.

The longer answer is that the rationale of *Gentile* and its progeny applies equally to attorneys and parties. In *Gentile*, the Court emphasized the distinction between "participants in the litigation and strangers to it," which it previously had recognized in *Seattle Times Co.* v. *Rhinehart,* supra, 467 U.S. 20. See *Gentile* v. *State Bar of Nevada*, supra, 501 U.S. 1072-73. The *Gentile* Court noted that in *Seattle Times*, it "unanimously held that a newspaper,

which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery." Id., 1073. The *Gentile* Court then quoted from *Seattle Times* as follows: "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting"; and further, "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." (Internal quotation marks omitted.) Id. In addition, the Court noted that "[f]ew, if any interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Id., 1075.

Based on the concerns raised in *Gentile*, the trial court may impose a gag order on the trial participants regardless of whether a party or their attorney is being restrained. A prejudicial statement made to the media by defense counsel is not somehow less prejudicial if made by the client. What matters is *what* is being said, not *who* is saying it. See *United States* v. *Brown,* supra, 218 F.3d 428 ("As the district court pointed out, trial participants, like attorneys, are privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties." [internal quotation marks omitted]). If anything, extrajudicial comments made by parties have the potential to be more prejudicial than comments made by attorneys:

> *Gentile* involved a state supreme court rule governing the conduct of members of the bar of that state, while [this case involes] a state trial court's restrictive order . . . directed to all trial participants. Because of their legal training, attorneys are knowledgeable regarding which extrajudicial communications are likely to be prejudicial. The other trial participants encompassed by the restrictive order in this case did not have such legal discernment and expertise. Given the public attention generated by this case, defendants, witnesses and

> law enforcement personnel were eager to talk with the press concerning their particular views. While attorneys can be governed by state supreme court or bar rules, other trial participants do not have these guidelines.

News-Journal Corp. v. *Foxman,* supra, 939 F.2d 1515 n.18.

K. State's Response To The Amicus Curiae

The amicus brief submitted by the Hartford Courant ("Courant") mirrors the defendant's brief with one exception: the Courant claims that the gag order "chills newsgathering, leads to less accurate reporting, and deprives the public of information." Brief of Amicus Curiae, p. 3. Specifically, the Courant maintains that this Court should vacate the gag order because it "will undoubtedly deter sources from speaking with the media rather than risk a possible contempt proceeding. This in turn will affect newsgathering and limit information available to the public concerning this matter." Id. The state's response is two-fold. First, it is well established that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 609 (1978); see also *Houchins* v. *KQED, Inc.,* 438 U.S. 1, 10112, 16 (1978); *Pell* v. *Procunier,* 417 U.S. 817, 833-35 (1974); *Branzburg* v. *Hayes,* 408 U.S. 665, 684-85 (1972).

Second, even if the gag order may deter sources from speaking with the news media about this case, the trial court's need to protect the jury pool from prejudicial extrajudicial commentary to ensure that the defendant receives a fair trial outweighs the news media's right to gather information outside of the courtroom. As noted by the Ninth Circuit, the "media is free to attend all of the trial proceedings before the [trial] court and to report anything that happens. In fact, the press remains free to direct questions at trial counsel. Trial counsel

simply may not be free to answer." *Radio & Television News Assn.* v. *U.S. District Court*, 781 F.2d 1443, 1446 (9th Cir.1986).

II. THE TRIAL COURT'S GAG ORDER DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO FREE SPEECH UNDER ARTICLE FIRST, § 4, OF THE CONNECTICUT CONSTITUTION.

The defendant contends that the trial court's gag order violates the "more robust speech protections" of article first, § 4, of the Connecticut constitution. Def.'s Brief, p. 34.[8] Although the defendant's brief is not entirely clear on this point, it would appear that he is asking this Court to adopt a per se rule against gag orders directed at trial participants. See id., 38-39 (contending that this "Court's precedents have long acknowledged that Article I, § 4, established a per se prohibition against prior restraints").

In *State* v. *Geisler*, 222 Conn. 672, 685 (1992), this Court "set forth six factors that, to the extent applicable, are to be considered in construing the contours of our state constitution so that [it] may reach reasoned and principled results as to its meaning. These factors are: (1) the text of the operative constitutional provision; (2) holdings and dicta of this Court and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies." *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157 (2008). In performing a *Geisler* analysis, this Court has recognized that the six factors "may be inextricably interwoven" and "not every *Geisler* factor

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[8] In his brief, the defendant does *not* rely on article first, §§ 5 and 14, which "also include other language that suggests that our state constitution bestows greater expressive rights on the public than that afforded by the federal constitution." *State* v. *Linares*, 232 Conn. 345, 381 (1995).

is relevant in all cases." (Internal quotation marks omitted.) Id. In this case, application of the relevant *Geisler* factors refutes the defendant's claim and supports the trial court's decision to apply the "substantial likelihood" test to the imposition of gag orders on trial participants.

A. The Text Of Article First, § 4, History, And Connecticut Precedent

Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." In certain instances, this Court has held that article first, § 4, provides greater free speech protection than the First Amendment. See *State* v. *Linares*, supra, 232 Conn. 380 (concluding that state constitution "bestows greater expressive rights on the public than that afforded by the federal constitution"); accord *Leydon* v. *Town of Greenwich*, 257 Conn. 318, 349 (2001). In other instances, however, this Court has held that it does not. See *State* v. *Taupier*, 330 Conn. 149, 174-76 (2018) (concluding that General Statutes "§ 53a-61aa (a) (3) does not violate the free speech provisions of the state constitution [on the basis that] those provisions protect a broader range of threatening speech than does the first amendment," and that nothing "in either *Linares* or *Leydon* v. *Greenwich* . . . suggests . . . that the government is constitutionally required to tolerate threatening speech when the speaker acted in reckless disregard and was aware that there was a substantial and unjustifiable risk that the speech would be interpreted as a serious threat"), cert. denied, 139 S. Ct. 1188 (2019); see also *State* v. *Baccala*, 326 Conn. 232, 237 n.5 ("leav[ing] for another day the question of whether the state constitution is more protective of speech than the federal constitution with regard to fighting words"), cert. denied, 138 S. Ct. 510 (2017). Accordingly, depending on the context, article first, § 4, may provide greater free speech protection than the First Amendment.

In addition, contrary to the defendant's assertion, neither the "plain language" of article first, § 4, nor the "famers' intent" establishes "a per se prohibition against prior restraints such as gag orders." Def.'s Brief, p. 38-39. Indeed, to the state's knowledge, no court has ever interpreted the free speech protections in a state constitution as establishing a per se prohibition on gag orders. See generally *Nebraska Press Ass'n* v. *Stuart*, supra, 427 U.S. 570 (Supreme Court "has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed").

B. Federal Precedent And Policy Considerations

For the reasons set forth in Part I.A. through Part I.K., above, federal precedent and the policy reasons underlying that precedent amply support Judge Blawie's decision to adopt the "substantial likelihood" test under the First Amendment as well as his application of that test to the facts and circumstances of this case. If this Court were to disagree, then it would be unnecessary to address the defendant's state constitutional claim because the gag order would be invalid under the First Amendment, and the case would need to be remanded for a new hearing based on the "clear and present danger" test or some other variation of strict scrutiny.

C. Sibling State Decisions

Post-*Gentile*, it appears that only two jurisdictions—New Mexico and Texas—have squarely considered claims that the "clear and present danger" test applies to gag orders on trial participants under the independent free speech protections of their respective state constitutions. See *Twohig* v. *Blackmer*, 918 P.2d 332, 333 (N.M. 1996) (under New Mexico constitution, "any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements

would pose a clear and present danger to the administration of justice"); *San Antonio Express-News, a Div. of Hearst Corp.* v. *Roman*, 861 S.W.2d 265, 267 (Tex. App. 1993) (under Texas constitution, prior restraint in criminal case will be upheld only if court makes specific findings based on evidence that "imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute").

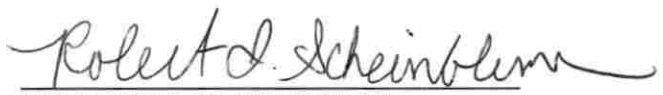
In sum, in certain contexts Connecticut citizens have broader free speech rights based on the unique text and history of the Connecticut constitution. Furthermore, although there is a dearth of sibling state precedent squarely addressing the question presented, both jurisdictions that have done so have applied some form of strict scrutiny to gag orders on trial participants. Nevertheless, for reasons set forth in Part I.A. through Part I.K, above, both the weight of federal precedent and the compelling policy reasons on which that precedent depends support a finding that the constitutional test for imposition of a gag order on trial participants is the same under the federal and state constitutions.

CONCLUSION

The trial court's gag order should be upheld because the court correctly adopted the "substantial likelihood" test and properly applied it to the facts and circumstances of this case. Alternatively, if this Court adopts the "clear and present danger" test under either the First Amendment or article first, § 4, then the trial court's order should be vacated and the case remanded for a new hearing.

Respectfully submitted,

STATE OF CONNECTICUT

BY: 

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November, 2019

CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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